Filed 7/16/20 P. v. Sanchez CA4/2
*See dissenting opinion.*

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JAVIER PESQUEDA SANCHEZ,<br>Defendant and Appellant. | E071772<br>(Super.Ct.No. RIF1602106)<br>OPINION |

APPEAL from the Superior Court of Riverside County. L. Jackson Lucky IV, Judge. Reversed.

Stephen M. Hinkle, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Javier Pesqueda Sanchez inappropriately touched his girlfriend's daughters, Jane Doe 1 (Doe1; born October 2003) and Jane Doe 2 (Doe2; born June 2005). Defendant was convicted of three counts of committing lewd and lascivious acts upon a child under the age of 14, and the special allegation that he committed qualifying sexual offenses against multiple victims.

Defendant claims on appeal that (1) the lack of a valid advisement of the potential sentencing consequences of his charges, and his rejection of the plea offered prior to trial, constitutes a violation of his federal constitutional due process rights requiring remand to the trial court for the prosecution to extend the previously offered plea bargain or set the case for new trial; (2) his due process rights were violated by the trial court imposing fines and fees without determining his ability to pay pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157; and (3) his sentence of 30 years to life in prison constitutes cruel and unusual punishment. The People contend the trial court imposed an unauthorized sentence of 30 years to life and remand for resentencing is required to impose the sentence of 50 years to life.

## FACTUAL AND PROCEDURAL HISTORY

### A. PROCEDURAL HISTORY

Defendant was convicted of committing a lewd and lascivious act upon Doe1 between January 1, 2016, and April 9, 2016 (Pen. Code,[1] § 288, subd. (a)); count 1). He was convicted in counts 3 and 4 of committing lewd and lascivious acts against Doe2

[1] All further statutory references are to the Penal Code unless otherwise indicated.

between January 1, 2016, and April 9, 2016. The jury found true the special allegation that he committed qualifying offenses against more than one victim (§ 667.61, subd. (e)(4)[2]).

Defendant was sentenced on count 1, the principal count, to 15 years to life. On count 3, the trial court imposed the sentence of 15 years to life to run consecutive to count 1. The 15-years-to-life sentence imposed on count 4 was ordered to run concurrent to counts 1 and 3. He received a total sentence of 30 years to life to be served in state prison. Defendant was ordered to pay a restitution fine in the amount of $300 (Pen. Code, § 1202.4, subd. (b)); a stayed parole revocation fine in the amount of $300 (Pen. Code, § 1202.45); a criminal conviction assessment fee of $90 (Govt. Code, § 70373); and court operations fees in the amount of $120 (Pen. Code, § 1465.8, subd. (a)(1)).

B. FACTUAL HISTORY

Since we conclude that defendant was improperly advised regarding the plea agreement, and that the record supports defendant may have accepted the plea had he been properly advised regarding remand, we only briefly review the facts of the case. Defendant was the boyfriend of E.L, who was the mother of Doe1 and Doe2. Doe1 and Doe2 had known defendant for a long time and thought of him as their father.

When Doe1 was 12 years old, defendant placed his hand under her shirt and touched her breast for about five seconds. When she was almost 13 years old, they were

[2] Because defendant committed his crimes in 2016, all references to section 667.61 are to the former version effective September 11, 2011, to December 31, 2018.

in his car together, and defendant unzipped her pants and placed his hand underneath her underwear. He touched her vaginal area and moved his fingers around.

When Doe2 was 10 or 11 years old, defendant drove her to school and touched her on her thigh near her private area. In April 2016, when she was 11 years old, Doe2 and defendant were in defendant's car. Defendant had picked her up from school because she was sick. He placed his hand inside her shirt and touched her breast, advising her he was checking her temperature. Doe1 and Doe2 told each other what defendant had done to them.

Defendant testified on his own behalf. He only touched Doe2's cheek and collar area to check her temperature. He had tapped her on the knee but never touched her on the thigh near her private part. As for the touching involving Doe1, she had accompanied him to his work as a gardener. She got leaves and dirt in her pants. He told her to unbutton her pants and use a cloth to clean off the dirt. He helped her brush away the dirt. As for touching her breast, he had only attempted to clean grass and dirt from Doe1's neck and shoulder area.

## DISCUSSION

### A. ADVISEMENT ON PLEA

Defendant claims the trial court misadvised him as to the time he was facing if he rejected the offer of seven years from the Riverside County District Attorney's Office (district attorney), made on the day of trial. The trial court advised defendant he was facing a potential minimum sentence of 30 years to life when in fact he was facing a

potential 50-years-to-life sentence. Defendant contends such advisement violated his due process rights under the Federal Constitution requiring reversal of his convictions.

1. *ADDITIONAL FACTUAL BACKGROUND*

On the day set for trial, the trial court stated on the record that the parties had discussed "settlement" of the case in chambers but defendant was not accepting the plea deal. Defendant's counsel put on the record, "Yes, your honor. And I would like to put on the record what has transpired. There was an offer on the table for seven years. [Defendant] and I discussed the offer for well over an hour now. [Defendant] has refused the offer. I did indicate to [defendant] that this is a life case, potentially a life case. So I just wanted to put that on the record."

The prosecutor responded, "I'd like to add seven years was offered to him before, not just this morning. That offer had been on the table for quite some time, and the defendant declined. I thought about it again, and I gave him this last opportunity to think about it this morning. It is not our practice to negotiate on the day of trial; however, I did give him that opportunity this morning. And it looks like he declined that. So it wasn't just this one hour that he had to think about the seven-year offer." Defendant's counsel responded, "And, your Honor, that is correct. Previously to that an offer was made of five years pre-preliminary hearing, and he declined that."

The trial court advised defendant, "I don't know much about your case at this point other than the charges. I, obviously, have not heard any evidence, but based on the charges, if you are convicted, I think the minimum sentence that you would get in state prison is 30 years to life in prison, 15 to life for one victim and 15 to life for the other

victim. And the DA's offer is seven years. So, sir, I just want to make sure you do understand what the district attorney's offer is and what the minimum sentence would be if you were convicted at trial."

The following exchange occurred:

"THE DEFENDANT: "Yeah, okay.

"THE COURT: So, yes, sir, you understand?

"[Defendant's counsel]: May I have a moment, your Honor?

"THE COURT: Yes.

"[Defendant's counsel]: Your Honor, just to clear up the record. The offer was eight years, that has been on the table, and now it's seven years. And he has refused it.

"[Prosecutor]: And my notes indicated seven. It's entirely possible there was eight, but my notes indicate back from November of 2017, that when [another deputy was assigned to the case], that she had considered seven instead of five, and she had rejected the five-year counter-offer from defense. Those are the notes I have.

"[Defendant's counsel]: Yes. [¶] Yes, your honor. We're ready. Thank you. [¶] Your Honor, we're ready to proceed. Thank you.

"THE COURT: So, [defendant], I just want to make sure that you understand the plea bargain offer. You understand it, sir?

"DEFENDANT: Yes.

"THE COURT: And you want to reject the plea bargain offer and go to trial?

"THE DEFENDANT: Yes."

At the time of sentencing, the trial court refused to strike the life punishment required to be imposed under section 667.61. Defendant was sentenced to 30 years to life. Defendant complained at sentencing that the evidence did not support his convictions as he did not touch the girls with lewd intent. Neither defendant nor his counsel commented on the length of the sentence imposed.

2. *MISADVISEMENT*

"The crucial decision to reject a proffered plea bargain and proceed to trial should not be made by a defendant encumbered 'with a grave misconception as to the very nature of the proceeding and possible consequences.' " (*In re Alvernaz* (1992) 2 Cal.4th 924, 936 (*Alvernaz*).) "[T]he court and the prosecutor, as officers of the court, have a duty not to misstate the law, whether intentionally or not." (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 734-735 (*Goodwillie*), fn. omitted.)

When a trial court misinforms a defendant about the consequences of a plea bargain, causing him to reject an offer he otherwise would accept, the defendant's due process rights have been violated. (*Goodwillie, supra*, 147 Cal.App.4th at pp. 733-735.) When "a defendant rejects the plea bargain and is subsequently convicted, reversal may be required if the omitted information makes the bargain more favorable to the defendant than it appeared to be without the information." (*Id.* at p. 734.)

In *Goodwillie*, *supra*, 147 Cal.App.4th 695, the court found a Fourteenth Amendment due process violation where a pro. per. defendant expressed on the record a willingness to plead guilty if he would receive full credit for good behavior. The trial court and the prosecutor misadvised him that he could not receive full credit and he

rejected the offer. At the end of trial, after he was convicted, the trial court determined he was in fact entitled to full credit. (*Id.* at p. 733.)

The *Goodwillie* court found, "The trial court and the prosecutor's misunderstanding brought the plea bargaining process to a halt, and thus prevented Goodwillie from obtaining a plea offer more favorable to him than the sentence he received after trial. This violates notions of fundamental fairness by the due process clause of the Fourteenth Amendment." (*Goodwillie*, *supra*, 147 Cal.App.4th at p. 735.)

Here, the trial court mistakenly advised defendant he could receive a minimum sentence of 30 years to life, rather than correctly advising him he faced a potential 50-years-to-life sentence. Section 667.61, subdivision (j)(2) provided "[a]ny person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e), upon a victim who is a child under 14 years of age, shall be punished by imprisonment in the state prison for 25 years to life." Here, defendant was convicted of three offenses, lewd and lascivious acts upon a child under the age of 14, offenses which were listed under section 667.61, subdivision (c)(8). Further, he was convicted of committing the offenses against multiple victims within the meaning of section 667.61, subdivision (e)(4). The trial court had the discretion to impose consecutive 25 years-to-life sentences for multiple victims pursuant to section 667.61, subdivisions (i) and (j)(2). (See *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1523-1524.) As such, he should have been advised he was facing a potential sentence of 50 years to life, rather than the 30 years to life as stated by the trial court. Defendant was clearly misadvised as to his sentence.

The People contend the trial court did not "misadvise" defendant because defendant was advised that the "minimum" sentence was 30 years to life. Advising defendant of the minimum sentence did not give defendant an accurate representation of the actual time he faced. "To be valid, guilty pleas must be based upon a defendant's full awareness of the relevant circumstances and the likely consequences of his action." (*People v. Johnson* (1995) 36 Cal.App.4th 1351, 1357.) "The trial court must advise the defendant ' "of the direct consequences of the conviction such as the permissible range of punishment provided by the statute." ' " (*People v. Archer* (2014) 230 Cal.App.4th 693, 705.) Advising defendant erroneously that he would receive a minimum sentence of 30 years to life rather than the 50-years-to-life sentence he could have received, did not fully inform him of the consequences if he did not take the plea bargain. This constitutes a due process violation.

The People further support their argument that defendant was not misadvised as to his potential sentence because the "One Strike" law requires a *default* 15-year minimum parole eligibility period. The People rely on *In re Vaquera* (2019) 39 Cal.App.5th 233, 240. Review was granted in *Vaquera* on November 26, 2019, S258376. Moreover, section 667.61, subdivision (j)(2) specifically provides that the commission of lewd and lascivious acts against a child under the age of 14 years old "shall be punished by imprisonment in the state prison for 25 years to life." The People do not explain defendant's claim that the minimum parole eligibility, despite the mandatory punishment of 25 years to life, properly advised defendant of the consequences of rejecting the plea offer.

Here, the trial court had to advise defendant that he was facing a potential sentence of 50 years to life in order for him to make a rational decision as to whether he should accept the offer of seven years. Defendant was 45 years old at the time of trial. A variance of 20 years in his sentence would make a difference in whether he would ever be released from prison during his lifetime. Further, defendant had no criminal record that would have imparted special knowledge about his sentence or the minimum parole eligibility. Defendant's due process rights under the Fourteenth Amendment were implicated based on the failure of the trial court to properly advise him of the potential maximum sentence he faced.

3. *PREJUDICE*

We must now determine if such failure to properly advise defendant was prejudicial. Appellate courts are split as to which party bears the burden to prove a defendant would have accepted the plea bargain if he had been properly advised. Most courts have held that the burden is on the defendant to show that reversal is required based on evidence that the defendant would have accepted the offer but for the misinformation. (*People v. Miralrio* (2008) 167 Cal.App.4th 448, 463 (*Miralrio*); see also *In re Moser* (1993) 6 Cal.4th 342, 352 [appellant must demonstrate prejudice when guilty plea was based on misadvisement]; and *People v. Archer* (2014) 230 Cal.App.4th 693, 705-706 [defendant had the burden to show he was prejudiced by misadvisement].) However, in *Goodwillie, supra*, 147 Cal.App.4th at pages 736-737, the court placed the burden on the People to show a lack of prejudice beyond a reasonable doubt. We are

persuaded by the reasoning in *Miralrio* which held that the burden is on the defendant to establish whether he was prejudiced. (*Miralrio*, *supra*, at p. 463.)

The *Goodwillie* court found that the federal due process error compelled reversal if the People failed to show the absence of prejudice beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. It concluded, " 'The People have not made such a showing. In fact, the evidence establishes that Goodwillie was prejudiced. Goodwillie can clearly establish that he would have accepted the plea offer that was made if he had been accurately advised of his credit eligibility.' " (*Goodwillie*, *supra*, 147 Cal.App.4th at p. 736.) The remedy fashioned in *Goodwillie* was that the matter would be remanded for the district attorney to either offer the original plea deal, or set the matter for retrial and resume plea negotiations. (*Goodwillie, supra*, 147 Cal.App.4th at p. 738.)

In *Miralrio*, *supra*, 167 Cal.App.4th 448, the trial court and the prosecutor misadvised the defendant that his potential maximum sentence if he went to trial was 60 years to life when he was facing a sentence of 120 years to life. (*Id.* at pp. 459-460.) The parties on appeal agreed that defendant had been misadvised. However, the appellate court concluded that reversal was not required because it was not "reasonably probable he would have accepted the plea offer had he been advised correctly." (*Id.* at p. 460.)

The *Miralrio* court rejected the standard in *Goodwillie*, putting the burden on the People to prove that defendant would not have accepted the plea offer had he been advised correctly. The *Miralrio* court relied first on the rule that "'[a]nyone who seeks on appeal to predicate a reversal of conviction on error must show that it was prejudicial." (*Miralrio*, *supra*, 167 Cal.App.4th at p. 462.) It was not the type of case in

which prejudice was presumed; prejudice must be demonstrated. (*Ibid.*) "Second, it makes sense to require the defendant to show prejudice, because the defendant is the only one who knows whether he would have accepted the plea bargain absent the misadvisement. *Goodwillie* thus assigns the People an impossible burden insofar as it requires the People to show absence of prejudice." (*Id.* at p. 463.)

The *Miralrio* court also noted that in *In re Alvernaz*, *supra*, 2 Cal.4th 924, 929-930, a case in which the defendant's counsel misadvised him on the plea and he raised an ineffective assistance of counsel claim, the California Supreme Court placed the burden on the defendant to show he would have made a different decision if he had been properly advised by counsel. The *Alvernaz* court cautioned that the reviewing court must look not to the self-serving statement of a defendant that he would have accepted the plea bargain because it "is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence." (*Id.* at p. 938.) After reviewing *Alvernaz,* the *Miralrio* court found, "[i]t would be anomalous to place the burden on the defendant in ineffective-assistance of counsel cases but on the People in other cases of misadvisement." (*Miralrio, supra,* 167 Cal.App.4th at p. 463.)

The *Miralrio* court concluded, after placing the burden on the defendant to show that he would have accepted the plea bargain, that the defendant had not met his burden of showing that he would have accepted the bargain had he "been correctly advised of [the] penal consequences." (*Miralrio, supra*, 167 Cal.App.4th at p. 463.) It noted, "At sentencing, the defense made no objection and showed no surprise at the 90-year

sentence, nor did the defense claim the earlier misadvisement caused defendant to reject the plea offer." (*Id.* at p. 463.) "Thus, . . . we conclude defendant fails to show the misadvisement prejudiced him so as to entitle him to reversal of the judgment." (*Id.* at p. 464.)

Here, at the beginning of the case, defendant had rejected a pretrial offer of seven years, which the prosecutor had explained had been on the table "for quite some time." Defense counsel and defendant spoke for over one hour about the plea offer. Defense counsel indicated that defendant had also rejected a five-year offer. However, the prosecutor clarified that defendant had been offered a sentence of seven years by another deputy district attorney and defendant had submitted a counter offer of five years, which was rejected by the district attorney.

While defendant rejected the seven-year offer outright on the day of trial, there is some indication in the record that there was a number of years that he was willing to accept. The record does not support he would reject any offer given to him, especially in light of the extended discussion that he had with counsel prior to rejecting the seven-year offer on the day of trial. The submission of a counter-offer was some objective evidence that he would accept a plea bargain.

In arguing that the advisement was not prejudicial, the People point to the fact that defense counsel advised the trial court that defendant had rejected a five-year offer prior to trial. However, as noted, that statement was qualified by the prosecutor that there had been a five-year counter offer from defendant's counsel, which was rejected by the district attorney.

Further, as noted, there was significant difference between a sentence of 50 years to life and 30 years to life. Defendant was 45 years old at the time of sentencing and could be released from prison during his lifetime if sentenced to 30 years to life. If he received a sentence of 50 years to life, he certainly would not ever be released from prison.

This case differs from *Miralrio.* In *Miralrio*, the appellate court pointed to the evidence in the record that the defendant did not express outrage or concern when he was sentenced to a higher sentence than that which he was advised of when offered the plea, as support for its conclusion that the evidence did not establish defendant would have accepted the plea bargain. (*Miralrio*, *supra*, 167 Cal.App.4th at p. 463.) Here, defendant could not express outrage when he was sentenced because he was improperly sentenced. He was sentenced to 30 years to life, which is what he was advised at the time of the plea offer; however, he should have been sentenced according to section 667.61, subdivision (e)(4), to 25 years to life, and the trial court clearly believed that consecutive sentences were appropriate. This also foreclosed defendant from raising the issue below that he was not properly advised, as the trial court imposed the sentence it had told to defendant.

Objective evidence in the record supports that defendant would have accepted the plea bargain had he been properly advised he was facing 50 years to life rather than the misadvisement that he was facing 30 years to life. The difference between the offered seven years and 50 years to life is significant. Counsel and defendant discussed the plea offer for over one hour, evidencing that defendant did not outright reject the seven-year

offer. Since we conclude that there is objective evidence that defendant would have accepted the plea bargain, we must determine the appropriate remedy.

In *Alvernaz*, *supra*, 2 Cal.4th 924, the court stated that "[s]pecific enforcement of a failed plea bargain is not a remedy required by the federal Constitution." (*Id.* at p. 942.) As such, "*Alvernaz* held that specific enforcement of a plea offer following trial and conviction is neither constitutionally required nor consistent with the trial court's broad discretion in determining the appropriate sentence of a defendant's criminal conduct where ineffective assistance of counsel causes a defendant to reject the pretrial plea bargain. [Citation.] Moreover, the Supreme Court noted that mandatory reinstatement of the plea bargain would be inconsistent with the legitimate exercise of the prosecutorial discretion involved in the negotiation and withdrawal of offered plea bargains. The prosecution could view the case very differently following a fair trial and conviction. The sentencing contemplated in the pretrial plea offer could no longer be consistent with the public interest and a prosecutor should not be locked into the proposed pretrial disposition." (*People v. Loya* (2016) 1 Cal.App.5th 932, 950-951 (*Loya*).)

The *Alvernaz* court then crafted the following remedy: "[T]he appropriate remedy for ineffective assistance of counsel that has resulted in a defendant's decision to reject an offered plea bargain (and to proceed to trial) is as follows: After granting of relief . . . by an appellate court, the district attorney shall submit the previously offered plea bargain to the trial court for its approval, unless the district attorney within 30 days elects to retry the defendant and resume the plea negotiation process. If the plea bargain is submitted to

and approved by the trial court, the judgment shall be modified consistent with the terms of the plea bargain." (*Alvernaz*, *supra*, 2 Cal.4th at p. 944.)

The *Goodwillie* court adopted this remedy for a due process violation remanding to the trial court for the prosecution to either submit the previous offer to the trial court for its approval or set the case for retrial and new plea negotiations. (*Goodwillie*, *supra*, 147 Cal.App.4th at p. 738-739; see also *Loya*, *supra*, 1 Cal.App.5th at p. 951, [applying the remedy in *Alvernaz* when the trial court abused its discretion by rejecting the proposed plea bargain because it "implements the dual concerns of protecting appellant's rights while also providing prosecutorial discretion"].)

After *Alvernaz*, the United States Supreme Court decided *Lafler v. Cooper* (2012) 566 U.S. 156 (*Lafler*), which like *Alvernaz* involved ineffective assistance of counsel and not a due process violation as in this case. In *Lafler*, the defendant rejected a plea offer based on erroneous advice from counsel and went to trial. He was convicted and sentenced to a significantly longer term than offered in the plea agreement. The defendant filed a federal habeas petition and the parties stipulated that the defendant's rejection of the plea offer was the result of poor advice from his defense counsel. *Lafler* held counsel's error was prejudicial because the defendant was sentenced to a significantly greater term than the plea offer, and the record supported that there was a reasonable possibility the court would have accepted the plea had the defendant been properly advised. (*Lafler*, pp. 160, 164-167.)

The *Lafler* court considered that the remedy for ineffective assistance of counsel depended upon the situation of the case. It recognized that the remedy "must 'neutralize

the taint' of a constitutional violation [citation], while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." (*Lafler, supra*, 566 U.S. at p. 170.) It noted one remedy would be to leave the convictions intact but allow the trial court to resentence the defendant to the lesser sentence offered in the plea. On the other hand, "In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. [Citation.] In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." (*Lafler*, at p. 171.)

The *Lafler* court further stated, "In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion. At this point, however, it suffices to note two considerations that are of relevance. [¶] First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a

constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial. (*Lafler*, *supra*, 566 U.S. at pp. 171-172.)

*Lafler* and *Alvernaz* involved ineffective assistance of counsel based on misadvisement by counsel, which resulted in the defendants rejecting the plea bargains rather than due process violations. *Lafler* does not dictate any specific remedy when a constitutional violation occurs when the trial court and prosecutor cause the defendant to reject the plea offer rather than misadvisement of counsel. Here, the trial court on the record appeared to be willing to accept the plea bargain.

Certainly, an appropriate remedy in this case is to remand in order for the district attorney to submit the original plea of seven years to the trial court for its approval. The record does not elucidate the charge to which defendant would plead to, but we presume the prosecution is aware of the details of the plea bargain. However, we must decide whether to follow *Alvernaz* and also give the district attorney the discretion to proceed to a new trial if it so chooses, or follow the remedy in *Lafler* and give the trial court the discretion to accept the previous offer, or reject the offer and reinstate the charges for which defendant was convicted. Both *Goodwillie* and *Loya* (which was decided after *Lafler*) have concluded that the appropriate remedy is that espoused in *Alvernaz*.

We conclude that since the court in *Lafler* did not specify a specific remedy that must be employed when a due process violation occurs, we will follow the California Supreme Court in *Alvernaz*, as the court did in *Loya*, which was decided after *Lafler*. As such, we remand in order for the district attorney to submit the plea bargain of seven years to the trial court for its approval. The district attorney can also choose to not offer the seven years and proceed to a new trial and restart plea negotiations.

Since the judgment is vacated, we need not address defendant's additional arguments.

**DISPOSITION**

The judgment is reversed, and the case is remanded to the trial court. The district attorney's may elect within 30 days of the issuance of the remittitur to submit the previous offer of seven years to the trial court for its approval, or set the case for retrial, and if the district attorney chooses, resume plea negotiations. If the trial court approves the plea bargain, the judgment shall be modified consistent with the terms of the plea bargain, and as modified, be reinstated.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

I concur:

McKINSTER
Acting P. J.

[*People v. Sanchez*, E071772]

RAPHAEL, J., Dissenting.

Defendant Javier Pesqueda Sanchez was convicted after a jury trial, and the fairness of that trial is unchallenged. He claims, however, that he was misadvised at the plea bargaining stage that he faced 30 years to life in prison if convicted. In fact, he faced 50 years to life. Had he been properly advised before trial, his argument goes, he would have accepted the People's seven-year plea offer, and the trial never would have occurred.

The majority accepts this argument and orders a new trial. One reason I respectfully disagree with this holding is the remedy. The United States Supreme Court in *Lafler v. Cooper* (2012) 566 U.S. 156 (*Lafler*) considered the proper remedy for constitutionally ineffective assistance of counsel that led to the rejection of a plea offer. That remedy does not include ordering a reprise of an error-free jury trial.

It is important to focus on what harm the *Lafler* remedy is meant to redress: a defendant's demonstration that he or she would have accepted a particular plea offer if effectively counseled. The remedy, the Supreme Court stated, must neutralize the taint of that constitutional violation "while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." (*Lafler*, *supra*, 566 U.S. at p. 170.) Under *Lafler*, if the defendant was convicted on the same charges as to which he was offered a plea, the remedy is to simply impose a new sentence, with the court exercising discretion as to whether it should be as low as the sentence that the defendant was offered in the plea deal. (*Id.* at

pp. 170-171.) If, however, a new sentence is inadequate to remedy the violation (because the prosecution had offered a plea to lesser charges), then the remedy "may be to require the prosecution to reoffer the plea proposal," with the trial judge ruling on whether or not to accept that plea or leave the conviction undisturbed. (*Id.* at p. 171.)

The *Lafler* remedy does not include ordering a fresh jury trial. This makes sense. The remedy for a constitutional violation should put the defendant in the position that he would have been had the violation not occurred. Repeating a trial is an ill-fitting remedy for error that would have led to an acceptance of a particular plea offer. (See *People v. Lightsey* (2012) 54 Cal.4th 668, 702 [citing *Lafler* favorably for "tailoring of the remedy to the Sixth Amendment violation at issue"].) Jury trials are expensive and burdensome, and it seems ill-advised to "squander" resources (*Lafler*, *supra*, 566 U.S. at p. 170) by having a second jury follow in the unsoiled footsteps of the first one. Upon a showing of a constitutional violation that led to rejection of a plea offer, I would apply the remedy that the United States Supreme Court applied in *Lafler*. By ordering a new trial, we instead permit a range of results that (as a matter of logic) include such outcomes as (a) no plea offer on remand, followed by an acquittal at trial; (b) the same plea offer made and rejected as before, followed by the same conviction at trial; or (c) a plea agreement reached that is much better or much worse for Sanchez than what was offered earlier. The *Lafler* remedy, in contrast, is properly tailored to the alleged violation.

The majority's remedy follows an opinion of our Supreme Court issued 20 years before *Lafler*. That case, *In re Alvernaz* (1992) 2 Cal.4th 924 (*Alvernaz*), did hold that a new trial is the remedy where constitutionally ineffective assistance of counsel leads to

the rejection of a plea offer. As an intermediate appellate court, we were bound by *Alvernaz* at the time it was decided. But *Alvernaz* relied on earlier United States Supreme Court authority for the proposition that "[s]pecific enforcement of a failed plea bargain is not a remedy required by the federal Constitution." (*Id*. at pp. 942-943.) After *Lafler*, that no longer is correct. The United States Supreme Court now has articulated a remedy for the very federal constitutional violation at issue in *Alvernaz*.

Because the United States Supreme Court is the final word on the U.S. Constitution, it seems to me that we can, should, and (perhaps) must follow the United States Supreme Court's remedy for the federal constitutional violation at issue. Because federal courts are bound to follow the nation's Supreme Court, a divergent California remedy would mean California defendants receive remedies for meritorious federal constitutional claims that vary depending upon whether a federal court or a state court grants their habeas challenge. (See, e.g., *United States v. Carter* (C.D. Cal. 2013) 2013 U.S. Dist. Lexis 206639 [ordering prosecution to reoffer plea agreement as a *Lafler* remedy, even though trial had occurred]; *Schwenk v. Ndoh* (N.D. Cal. 2020) 2020 U.S. Dist. Lexis 94562 [for post trial *Lafler* violation, "[t]o place Petitioner back in the position he would have been if the constitutional violation had not occurred, the state must reinstate its October 2 offer"].) Remarkably, even as to the petitioner in *Alvernaz* itself, our Supreme Court's remedy apparently did not survive federal habeas, with a federal court ordering the petitioner released if the state did not re-offer the plea. (*Alvernaz v. Ratelle* (S.D. Cal. 1993) 831 F. Supp. 790, 799.) Our Supreme Court could adopt a different remedy based on our *state* Constitution, but I do not think that we have

been provided reason to conclude that ineffective assistance of counsel should be treated differently under the two constitutions, as *Alvernaz* treated those constitutions together.

As well as disagreeing with the remedy, I also respectfully disagree that Sanchez has made the required showing for relief. In my view, Sanchez has satisfied the first prong of *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*) because his counsel was ineffective in informing him that he faced 30 years to life when he actually faced 50 years to life. Unlike the majority, however, I do not believe he has shown that he was prejudiced by that ineffective assistance. He must demonstrate that he would have accepted the plea offer if he had been correctly advised. In my view, at a minimum, he must submit evidence (such as his own declaration), and the trial court must make such a determination upon an evidentiary hearing.

I would thus resolve this case differently than would the majority. I would remand for the court to hold an evidentiary hearing as to prejudice under *Strickland*'s second prong and order that the court apply the *Lafler* remedy if Sanchez prevails. Alternatively, I also believe it would be proper to reject the misadvisement claim in this direct appeal because Sanchez may litigate this matter on a habeas petition.

*The Due Process Argument*

The majority rejects the *Lafler* remedy primarily because Sanchez has briefed this appeal as involving a violation of due process (under the Fifth Amendment), rather than implicating the ineffective assistance of counsel (under the Sixth Amendment). (Maj. opn., *supra*, at p. 18.) Both *Lafler* and *Alvernaz* concern ineffective assistance of counsel, which requires the familiar two part test from *Strickland*. A due process

violation allegedly arises here because not only did counsel misadvise Sanchez, but so did the trial court (with the prosecutor present as well). Neither our Supreme Court nor the United States Supreme Court has applied the due process clause to this type of error.

In my view, a defendant may not re-cast *Lafler* ineffective assistance of counsel as a violation of due process. Where a defendant is represented during the plea process, constitutional challenges to a guilty plea may be brought only through claims of ineffective assistance of counsel. (*Hill v. Lockhart* (1985) 474 U.S. 52, 56-57.) It should be no different for challenges to a decision *not* to accept a plea offer. Here, Sanchez's counsel discussed the plea offer with him for "well over an hour" on the day of trial; that offer had been "on the table for quite some time"; and there had been a different offer before the preliminary hearing. During this time advising Sanchez, counsel apparently had an erroneous view of the penalty Sanchez faced. (If not, Sanchez was not misadvised, and there was no error.)

In contrast, the trial court erred by looking at the charges on the day of trial and stating what it thought the minimum sentence was to be. Defense counsel—present, immersed in the case, and engaged in a lengthy plea discussion—did not correct the error. As with misadvice that leads to a plea, attorney misadvice that allegedly deterred a plea should be analyzed under *Strickland*'s test for ineffective assistance of counsel, not under some other due process test that focuses on what the court may also have done. For example, *Padilla v. Kentucky* (2010) 559 U.S. 356, treats errors in failing to advise a defendant that deportation could be a consequence of a guilty plea as ineffective assistance of counsel, even though in every unsatisfactory plea hearing a court would *also*

have failed to so inform the defendant. Further, seeing the Fifth and Sixth Amendment rights as severable here may be misguided, as *Strickland* itself stated that effective assistance of counsel was one of the "basic elements" that serves to protect the due process right to a fair trial. (*Strickland, supra*, 466 U.S. at pp. 684-685.) For this reason, I think it reasonable for us to treat the "due process" issue Sanchez raises as the ineffective assistance of counsel issue that it actually is.

We need not consider to what extent it can be reversible error for an *unrepresented* defendant to be misinformed by a court about the consequences of a plea offer, which was the question in *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 733-738. Any error here was not "attributable to a source other than defense counsel." (*Id*., at p. 738.) The error asserted here was attributable to defense counsel, immersed in lengthy plea discussions with his client.[1]

I would remand to determine whether the ineffective assistance of counsel was prejudicial, and, if so, order application of the *Lafler* remedy, as outlined by the United

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[1] *People v. Miralrio* (2008) 167 Cal.App.4th 448 (*Miralrio*) does not hold that ineffective assistance of counsel can be properly recharacterized as a due process violation subject to a standard other than *Strickland*. *Miralrio* did consider a represented defendant's due process claim of a *Lafler* violation, where that defendant did not want to raise ineffective assistance of counsel because that "would require a petition for writ of habeas corpus." (*Miralrio, supra*, at p. 460, fn. 7.) *Miralrio*, however, simply assumed "for the sake of argument" that *Goodwillie* correctly found that misadvisement of penal consequences worked a due process violation. (*Miralrio*, at p. 462.) *Miralrio* did not hold as much. Further, *Miralrio* applied a substantive standard much like the *Strickland* standard because it would be "anomalous" to do otherwise. (*Miralrio*, at p. 463.) The majority also relies on *People v. Loya* (2016) 1 Cal.App.5th 932, 946-952, but that case is about pure judicial error—the court's refusal to accept a plea agreement—and not about attorney Sixth Amendment error that a defendant attempts to treat as a due process error under a different standard.

States Supreme Court. Alternatively, I would state that Sanchez can litigate his ineffective assistance of counsel claim on habeas. Because my position is in dissent, there is no need to address the other issues in this case.

RAPHAEL
J.